

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CONCORDE EQUITY II, LLC, a) Case No. 10-1041 SC
Delaware limited liability)
company;) ORDER DENYING PLAINTIFF'S
Plaintiff,) MOTION FOR APPOINTMENT OF
vs.) TEMPORARY RECEIVER;
) CONCURRENT APPOINTMENT OF
KENNETH ALFRED MILLER, an) PERMANENT RECEIVER; AND
individual; GEORGE CRESSON, an) PRELIMINARY INJUNCTION
individual; LOANVEST XIII, L.P., a)
California Limited Partnership;)
SENTINEL INVESTMENT MANAGEMENT)
COMPANY, a California Corporation;)
SOUTH BAY REAL ESTATE COMMERCE)
GROUP, LLC, a California Limited)
Liability Company; PETER SCOTT)
CARTER, Jr., an individual; and)
OLD REPUBLIC TITLE COMPANY, a)
Vermont corporation,)
Defendants.)

I. INTRODUCTION

This matter comes before the Court on the Motion for Appointment of Temporary Receiver; Concurrent Appointment of Permanent Receiver; and Preliminary Injunction filed by Plaintiff Concorde Equity II, LLC ("Plaintiff"). Docket No. 17 ("Motion"). Defendants Kenneth Alfred Miller and Sentinel Investment Management Company (collectively, "Miller Defendants") filed an Opposition. Docket No. 28 ("Miller Opp'n"). Defendants Loanvest XIII, L.P., South Bay Real Estate Commerce Group, Peter Scott Carter, Jr., and George Cresson (collectively, "Loanvest Defendants") filed an

1 Opposition. Docket No. 30 ("Loanvest Opp'n"). Plaintiff submitted
2 a Reply. Docket No. 31. For the reasons stated herein, the Court
3 DENIES the Motion.

4

5 **II. BACKGROUND**

6 **A. Procedural Background**

7 This case was removed to federal court on March 11, 2010. See
8 Docket No. 1 ("Notice of Removal"). Plaintiff filed a First
9 Amended Complaint ("FAC") on March 16, 2010. See Docket No. 8
10 ("FAC"). The Loanvest Defendants and the Miller Defendants filed
11 motions to dismiss. See Docket Nos. 14, 15. Plaintiff filed this
12 Motion for Appointment of Receiver on April 12, 2010, and the Court
13 denied Plaintiff's request for the Court to hear the Motion on
14 shortened time. Docket No. 25 ("Apr. 20, 2010 Order"). Shortly
15 thereafter, the parties stipulated that Plaintiff could file a
16 Second Amended Complaint ("SAC") and that the pending motions to
17 dismiss could be taken off calendar. Docket No. 27 ("Stipulation
18 and Order"). Plaintiff's SAC was filed on May 17, 2010. Docket
19 No. 34 ("SAC").

20 **B. Factual Background**

21 In the SAC, Plaintiff makes the following allegations.
22 Plaintiff is a technology investment company. Id. ¶ 3. Plaintiff
23 provided funding for a loan from Loanvest XIII, L.P., to Roem
24 Builders and/or Roem Development Company ("Roem"). Id. ¶ 22.
25 Various Defendants represented that Plaintiff would be entitled to
26 a return of 17% of the contributed money, as well as three points
27 for loan origination fees and one point on the total loan amount.
28 Id. ¶ 23. When the loan closed, Plaintiff was supposed to go

1 direct on title, with title insurance, and the money Plaintiff
2 placed in escrow was not supposed to be transferred out of the
3 escrow account without Plaintiff's written consent. Id. ¶¶ 27-28.

4 On or about October 21, 2009, Plaintiff wired \$930,000 into an
5 Old Republic Title Company escrow account. Id. ¶ 29. In November
6 2009, Rob Fitzgerald ("Fitzgerald"), Plaintiff's managing partner,
7 was told that the first disbursement of the loan was being cut in
8 half. Id. ¶ 30. In response, Plaintiff sought to have its
9 participation in the loan cut in half. Id. ¶ 32. Plaintiff
10 alleges that its money was removed from the Old Republic Title
11 Company escrow account without its permission, and that the money
12 was used to fund a loan transaction that closed on November 13,
13 2009 ("the Roem loan"). Id. ¶¶ 37-42. Plaintiff was told that it
14 did not have any participatory interest in the Roem loan, and that
15 its money was not secured in any way. Id. ¶ 40. Plaintiff asserts
16 fifteen causes of action against the Miller Defendants, the
17 Loanvest Defendants, and the Old Republic Title Company, including
18 fraud, negligent misrepresentation, violations of the Racketeer
19 Influenced and Corrupt Organization Act, and breach of contract.
20 Id. ¶¶ 43-135.

21 Plaintiff seeks appointment of a temporary -- and later
22 permanent -- receiver to service the Roem loan, and to obtain and
23 retain payments from Roem. Mot. at 4. Plaintiff also seeks a
24 preliminary injunction compelling Defendants to cooperate with the
25 receiver by delivering books and records of monies received related
26 to the loan at issue. Id. Plaintiff alleges that the Roem loan
27 will be repaid in full in July 2010, and that Plaintiff's money
28

1 "will be lost forever, and CONCORDE will be unable to collect on
2 any judgment against defendants." Id. at 11.
3

4 **III. LEGAL STANDARD**

5 Appointing a receiver is an "extraordinary equitable remedy,"
6 which should be applied with caution. Canada Life Assurance Co. v.
7 LaPeter, 563 F.3d 837, 844 (9th Cir. 2009). While there is no
8 precise formula for determining when a receiver may be appointed,
9 federal courts consider a variety of factors, including:

10 (1) whether [the party] seeking the appointment has a
11 valid claim; (2) whether there is fraudulent conduct
12 or the probability of fraudulent conduct by the
13 defendant; (3) whether the property is in imminent
14 danger of being lost, concealed, injured, diminished
15 in value, or squandered; (4) whether legal remedies
16 are inadequate; (5) whether the harm to plaintiff by
denial of the appointment would outweigh injury to the
party opposing appointment; (6) the plaintiff's
probable success in the action and the possibility of
irreparable injury to plaintiff's interest in the
property; and, (7) whether [the] plaintiff's interests
sought to be protected will in fact be well-served by
receivership.
17

18 Id. (quotation marks and citations omitted). "[T]he district court
19 has broad discretion in appointing a receiver, . . . it may
20 consider a host of relevant factors, and . . . no one factor is
21 dispositive." Id. at 845.
22

23 **IV. DISCUSSION**

24 Plaintiff alleges that it will suffer irreparable harm if the
25 Court does not appoint a receiver to manage the loan repayments
26 being made by Roem to various Defendants. Mot. at 11-12.
27 Plaintiff asserts that Defendants will probably abscond with the
28

1 proceeds of the loan repayments, or that the funds will be
2 concealed or squandered. Id. at 13, 15.

3 The circumstances of this case do not warrant the
4 extraordinary equitable remedy Plaintiff seeks. In Canada Life
5 Assurance, the Ninth Circuit upheld the appointment of a receiver
6 to manage a shopping mall, where income from the mall was being
7 inappropriately diverted, and where there was a risk that the value
8 of the mall might be insufficient to discharge the debt it secured.
9 563 F.3d at 845. Those kind of equitable considerations are not at
10 play in this case.

11 Here, Plaintiff's Prayer for Relief shows that it seeks legal
12 remedies; Plaintiff wants the return of the money used to fund the
13 Roem loan, plus various other forms of monetary relief, including
14 interest, punitive damages, court costs and attorney fees. See SAC
15 at 27-33. As such, Plaintiff's alleged injury is compensable in
16 damages and appointment of a receiver is not appropriate. See
17 Leighton v. One William Street Fund, Inc., 343 F.2d 565, 568 (2nd
18 Cir. 1965) (receiver inappropriate where alleged waste of assets
19 would be compensable in damages).

20 Plaintiff is concerned that the money taken from the Old
21 Republic Title Company escrow account will be "lost forever" and
22 that Plaintiff will be unable to collect on a judgment against
23 Defendants. See Fitzgerald Decl. ¶ 26.¹ However, Plaintiff's own
24 allegations undercut this concern. Plaintiff alleges that the Roem
25 loan may be repaid in full in July 2010. Id. ¶ 25. If so, then

26 ¹ Fitzgerald filed a Declaration in Support of the Motion. Docket
27 No. 18. The Miller Defendants filed an evidentiary objection to
28 Fitzgerald's statement. Docket No. 29. The Court overrules the
objection and considers the statement, although, as explained
below, the Court is not convinced by Fitzgerald's statement.

1 Defendants should be able to satisfy any judgment against them.
2 Here, there is nothing to suggest that any of the Defendants are of
3 doubtful financial standing, and nothing to suggest that legal
4 remedies would be inadequate. See Canada Life Assurance, 563 F.3d
5 at 844 (factors to consider include defendant's doubtful financial
6 standing and inadequacy of legal remedies). There is also nothing
7 to suggest that Plaintiff's money is in imminent danger of being
8 lost, concealed, injured, diminished in value, or squandered.
9 Finally, denying Plaintiff's request for appointment of a receiver
10 does not impede Plaintiff's ability to continue to prosecute this
11 action against Defendants, whereas appointment of a receiver has
12 the potential to impose costs on Defendants, see Carter Decl. ¶ 8,²
13 and would complicate this case unnecessarily. Accordingly, the
14 Court DENIES Plaintiff's request for appointment of a receiver.

15 For the same reasons, the Court DENIES Plaintiff's request for
16 a preliminary injunction compelling Defendants to cooperate with a
17 receiver. A plaintiff seeking preliminary injunctive relief must
18 establish a likelihood of success on the merits; a likelihood of
19 irreparable harm in the absence of preliminary relief; that the
20 balance of equities tips in favor of an injunction, and that an
21 injunction is in the public interest. Winter v. Natural Resources
22 Def. Council, Inc., 129 S. Ct. 365, 374 (2008). Here, Plaintiff
23 has not shown a likelihood of irreparable harm. Plaintiff seeks
24 the return of its money, and "monetary injury is not normally

25 ² Peter Scott Carter ("Carter"), owner of South Bay Real Estate
26 Commerce Group, LLC ("South Bay"), filed a Declaration in
27 Opposition to the Motion. Docket No. 30-1. Plaintiff filed an
28 evidentiary objection to Carter's statement. Docket No. 32. As
the owner of South Bay, which is the managing general partner of
Loanvest XIII, L.P., Carter is competent to testify regarding the
effects of appointing a receiver.

1 considered irreparable." Los Angeles Mem'l Coliseum Comm'n v.
2 Nat'l Football League, 634 F.2d 1197, 1202 (9th Cir. 1980). As
3 explained above, Plaintiff's own allegations suggest Defendants
4 should be able to satisfy any judgment against them. Under these
5 circumstances, injunctive relief is not warranted.

6
7 **v. CONCLUSION**

8 For the reasons stated above, the Court DENIES the Motion for
9 Appointment of Temporary Receiver; Concurrent Appointment of
10 Permanent Receiver; and Preliminary Injunction filed by Plaintiff
11 Concorde Equity II, LLC.

12
13 IT IS SO ORDERED.

14
15 Dated: June 9, 2010


16 Samuel L. Parker
17 UNITED STATES DISTRICT JUDGE